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No. 01-651

In the Supreme Court of the United States

CHASE MANHATTAN BANK, PETITIONER

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether corporations organized under the laws of United Kingdom Overseas Territories are "citizens or subjects of a foreign state" for purposes of alienage diversity jurisdiction under 28 U.S.C. 1332(a)(2).

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INTEREST OF THE UNITED STATES

Article III of the Constitution extends the judicial power of the United States to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. Art. III, § 2, Cl. 1. Congress, in turn, has enacted the alienage diversity statute, which grants federal district courts jurisdiction over civil actions in which the matter in controversy exceeds $75,000, exclusive of interest and costs, and the action "is between * * * citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. 1332(a)(2). Congress enacted that statute to ensure, consistent with Article III, that private international disputes between United States citizens and foreign citizens or subjects, involving substantial amounts in controversy, may be resolved in federal judicial fora.

The United States has a significant interest in the correct interpretation of the alienage diversity statute because that grant of jurisdiction facilitates international commerce and because misapplication of that statute could have significant foreign policy ramifications. The alienage diversity statute gives foreign nations assurance that civil actions between their citizens or subjects and United States citizens may be resolved in a neutral national forum. The court of appeals' construction of that statute has led, on the other hand, to repeated and well-founded objections from an important ally, the United Kingdom, that the court has improperly denied subjects of the United Kingdom access to an important federal forum for resolving international commercial disputes. Relations between the United States and a number of other countries with dependent territories and possessions—including France, the Netherlands, Australia, New Zealand, Norway and Denmark—could also be affected. The United States is keenly interested in ensuring that the alienage diversity statute is interpreted in a manner consistent with congressional intent. That interpretation encourages foreign nations to afford United States citizens reciprocal access to foreign courts.

STATEMENT

Petitioner Chase Manhattan Bank sued respondent in the United States District Court for the Southern District of New York for breach of an indenture agreement providing for the issuance of secured debt to finance respondent's business ventures. See Pet. App. 15a-16a. The district court granted summary judgment in favor of petitioner, allowed foreclosure on collateral valued at more than $49 million, and entered a deficiency judgment of more than $98 million. See *id.* at 8a, 13a, 15a-16a, 54a. The court of appeals reversed that decision and ordered the district court to dismiss the action for lack of subject matter jurisdiction in light of the

court of appeals' prior decision in *Matimak Trading Co.* v. *Khalily*, 118 F.3d 76 (2d Cir. 1997), cert. denied, 522 U.S. 1091 (1998). Pet. App. 1a-7a. The court of appeals concluded that the district court improperly exercised jurisdiction under the alienage diversity statute, 28 U.S.C. 1332(a)(2), because respondent, which is a corporation organized under the laws of a United Kingdom Overseas Territory, is not a "citizen[] or subject[] of a foreign state." Pet. App. 7a.[1]

1. Petitioner is a United States bank, incorporated under the laws of the State of New York, that engages in domestic and international financing. Respondent is a foreign corporation organized under the laws of the British Virgin Islands. Petitioner and respondent entered into an indenture agreement under which respondent issued notes, secured by collateral, in the aggregate amount of $119,000,000. The notes were issued to finance the activities of respondent's four Hong Kong subsidiaries, which engage in joint ventures for road construction projects in China. Respondent agreed to make regular repayments on the notes to petitioner. It also agreed that the indenture was governed by the laws of New York and that it would submit "to the jurisdiction of any court of the State of New York or any United States federal court sitting in the Borough of Manhattan, New York City, New York." Pet. App. 2a-3a, 15a-18a; see Pet. 3.

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[1] The United Kingdom Overseas Territories include Anguilla, Bermuda, British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, the Falkland Islands, Gibraltar, Montserrat, the Pitcairn Islands, Saint Helena and dependencies, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands. Pet. 6 n.2; British Nationality Act 1981, 31 *Halsbury's Statutes of England and Wales* 127, Sched. 6 (4th ed. 1994). Prior to 1998, the United Kingdom referred to the Overseas Territories as "Dependent Territories," but there is "no practical difference" between those terms. Pet. App. 6a n.1. Until its July 1, 1997, reversion to China, Hong Kong was a British Dependent Territory.

When respondent defaulted on its payments, petitioner brought this action in federal district court to obtain immediate repayment of respondent's indebtedness, including both principal and interest. The district court granted petitioner's motion for summary judgment in its entirety. Pet. App. 15a-54a. That court determined at the outset, and without objection from respondent, that it possessed subject matter jurisdiction by virtue of the alienage diversity statute, 28 U.S.C. 1332(a)(2), "because [petitioner] is a corporate citizen of New York, [respondent] is a corporate citizen of the British Virgin Islands and the matter in controversy exceeds $75,000." Pet. App. 17a. The court then rejected respondent's "impossibility" defense to liability, *id.* at 36a-52a, and authorized petitioner to foreclose on collateral accounts totaling $49,054,290.84, *id.* at 8a-9a, 54a. The court later issued an order directing entry of a deficiency judgment in the amount of $98,388,352.74. *Id.* 8a-14a.

2. On respondent's appeal, the court of appeals sua sponte raised the question whether the district court possessed subject matter jurisdiction under the alienage diversity statute. Following supplemental briefing, the court of appeals ruled that the district court lacked jurisdiction because corporations organized under the laws of United Kingdom Overseas Territories do not qualify as "citizens or subjects of a foreign state" under 28 U.S.C. 1332(a)(2). Pet. App. 1a-7a. The court observed that it had addressed the application of the alienage diversity statute to United Kingdom Overseas Territories (which were then called Dependent Territories, see note 1, *supra*) in *Matimak Trading Co.*, *supra*.

In *Matimak*, a corporation incorporated in Hong Kong, which was then a Dependent Territory, invoked a federal district court's alienage diversity jurisdiction prior to Hong Kong's 1997 reversion to China. The court of appeals ruled that, because "the United States does not regard Hong Kong

as an independent, sovereign political entity," the corporation did not qualify as a "citizen[] or subject[] of a foreign state." Pet. App. 5a (quoting *Matimak*, 118 F.3d at 82). Furthermore, the court ruled that, because the corporation was not a citizen or subject of the United Kingdom under British law, the corporation was "stateless" and "c[ould not] sue a United States citizen under alienage jurisdiction." *Ibid.* (quoting *Matimak*, 118 F.3d at 85, 86). The court of appeals subsequently adhered to the *Matimak* reasoning in *Koehler* v. *Bank of Bermuda (New York) Ltd.*, 209 F.3d 130, amended, 229 F.3d 424, rehearing en banc denied, 229 F.3d 187 (2d Cir. 2000) (Bermuda corporation and citizen), and *Universal Reinsurance Co.* v. *St. Paul Fire & Marine Insurance Co.*, 224 F.3d 139 (2d Cir. 2000) (Bermuda corporation).

In this case, the court noted, respondent is a corporation created under the laws of the British Virgin Islands, and "[t]he British Virgin Islands is a British Dependent Territory, as Hong Kong was at the time of *Matimak* and Bermuda was at the time of *Koehler* and *Universal Reinsurance*." Pet. App. 6a. Finding that "[n]othing relevant to the alienage jurisdiction inquiry has changed since we decided those appeals," the court of appeals concluded that "[w]e are bound to hold that [respondent] is not a citizen or subject of a foreign state and that the district court therefore had no alienage jurisdiction over this action under § 1332(a)(2)." *Id.* at 6a-7a. Finding no other basis for jurisdiction, the court of appeals reversed the judgment of the district court and remanded the case to that court with instructions to dismiss the complaint. *Id.* at 7a. The court of appeals later denied a petition for rehearing en banc. *Id.* at 55a-56a.

SUMMARY OF ARGUMENT

Corporations chartered in United Kingdom Overseas Territories are "citizens or subjects" of the United Kingdom for purposes of alienage jurisdiction under 28 U.S.C. 1332(a)(2). The term "citizens or subjects" includes all persons or entities that are subject to the sovereign authority of a recognized state. Respondent falls within this definition because it was created pursuant to the laws of the United Kingdom and is subject to that nation's sovereignty. The origins and purposes of Article III's alienage diversity clause, and of the statutes Congress has enacted to give it effect, confirm that reading. Indeed, by preventing disputes like this one from being heard in a neutral federal forum, the Second Circuit's *Matimak* decision has frustrated each of the twin purposes of alienage jurisdiction—avoiding conflicts with foreign governments and facilitating international commerce.

Respondent is a "citizen or subject" of the United Kingdom within the plain meaning of that term. The standard definition of "subject" is one who owes allegiance to a sovereign and is governed by its laws. For more than a century, this Court has recognized that corporations are to be treated as citizens or subjects of the sovereign under whose laws they were created. The United Kingdom has clearly asserted sovereignty over the British Virgin Islands and the other United Kingdom Overseas Territories, and the United States has consistently recognized the United Kingdom's authority over them.

The meaning of the alienage diversity statute is further illuminated by the origins and history of alienage jurisdiction. The Framers of the Constitution unanimously agreed that a neutral federal forum was needed to resolve disputes involving foreign citizens and subjects—both to avoid controversies with foreign powers and to attract

much-needed foreign investment. The term "subject" had the same broad meaning at the time of the framing that it has now. Congress has consistently provided for alienage jurisdiction since the Judiciary Act of 1789, and, though the precise terminology has varied, there is no evidence that it has ever intended to define "citizen or subject" in a manner narrower than that authorized by the Constitution.

The Second Circuit is alone among the courts of appeals in refusing to recognize alienage diversity jurisdiction over corporations chartered in United Kingdom Overseas Territories. That court's error arose from its mistaken belief that the question whether such corporations are "citizens or subjects" of the United Kingdom within the meaning of Article III and 28 U.S.C. 1332(a)(2) is one of United Kingdom law instead of United States law. Foreign states may certainly define "citizen" and "subject" for purposes of their own immigration, nationality, and commercial laws, but whether an individual or entity is a "citizen or subject" of a particular state for purposes of federal alienage jurisdiction is ultimately a question of federal, not foreign, law. Because both the plain meaning and purposes of 28 U.S.C. 1332(a)(2) support the same result, corporations chartered in United Kingdom Overseas Territories are "citizens or subjects" of the United Kingdom for purposes of alienage jurisdiction.

ARGUMENT

THE ALIENAGE DIVERSITY STATUTE GRANTS FEDERAL DISTRICT COURTS JURISDICTION OVER SUITS BETWEEN CITIZENS OF A STATE AND CORPORATIONS ORGANIZED UNDER THE LAWS OF A UNITED KINGDOM OVERSEAS TERRITORY

A. The Plain Language Of The Alienage Diversity Statute Establishes That Corporations Organized Under The Laws Of United Kingdom Overseas Territories Are "Citizens Or Subjects Of A Foreign State"

The alienage diversity statute grants federal district courts jurisdiction over disputes between "citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. 1332(a)(2). The controlling issue here is whether corporations organized under the laws of United Kingdom Overseas Territories are "citizens or subjects of a foreign state" for purposes of that statute. Those corporations are included within that term because they are subject to the sovereignty of the United Kingdom and governed by its laws.

The term "citizen or subject" includes all persons or entities that are subject to the sovereign authority of a foreign state. As this Court observed in *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898):

> Subject and citizen are, in a degree, convertible terms as applied to natives; and though the term *citizen* seems to be appropriate to republican freemen, yet we are equally with the inhabitants of all other countries, *subjects*, for we are equally bound by allegiance and subjection to the government and law of the land.

Id. at 665 (quoting 2 James Kent, *Commentaries on American Law* 258 n.b. (6th ed. 1848)). See generally *id.* at 658-666. The term "citizen or subject" accordingly embraces

all that is encompassed by the plain meaning of the term "subject" and includes any person or entity that "owes allegiance to a sovereign and is governed by that sovereign's laws." *Black's Law Dictionary* 1438 (7th ed. 1999).[2]

The term "citizens or subjects" is not limited to natural persons. Under long established principles of jurisdiction, "citizens or subjects of a foreign state" include corporations and other organizations that are created under the laws of a foreign state. See, *e.g.*, *Steamship Co.* v. *Tugman*, 106 U.S. 118, 121 (1882) (Harlan, J.) ("a corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively, a citizen or subject of such State"). See also *Swiss National Insurance Co.* v. *Miller*, 267 U.S. 42, 46 (1925); Joseph Story, *Commentaries on the Constitution of the United States* § 891, at 636 (Ronald D. Rotunda & John E. Nowak eds., 1987).[3]

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[2] Accord *Webster's Third New International Dictionary* 2275 (1976) (defining a "subject" as "one that is placed under the authority, dominion, control, or influence of someone or something: as * * * (1): one subject to a monarch or ruler and governed by his law (2): one who lives in the territory of, enjoys the protection of, and owes allegiance to a sovereign power or state"); *American Heritage Dictionary of the English Language* 1788 (3d ed. 1992) (defining a "subject" as "[o]ne who is under the rule of another or others, especially one who owes allegiance to a government or ruler"); 17 *Oxford English Dictionary* 28 (2d ed. 1989) (defining a "subject" as "[o]ne who is under the dominion of a monarch or reigning prince; one who owes allegiance to a government or ruling power, is subject to its laws, and enjoys its protection").

[3] Congress has stated expressly that, for purposes of ordinary diversity jurisdiction, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 U.S.C. 1332(c)(1). The term "State" in that provision refers to the "States" comprising the United States (as well as United States Territories, the District of Columbia, and the Commonwealth of Puerto Rico). See 28 U.S.C. 1332(d).

The corporation in this case was organized under the laws of the British Virgin Islands, a United Kingdom Overseas Territory. As the United States has recognized, the United Kingdom clearly has sovereign authority over that Territory.[4] The United States conducts official diplomatic relations with the British Virgin Islands through the United Kingdom's Foreign and Commonwealth Office.[5] The United Kingdom has expressed its retention of sovereignty through the Constitution of the British Virgin Islands, which, among other things, explicitly reserves the United Kingdom's "full power to make laws for the peace, order and good government of the Virgin Islands." British Virgin Islands (Constitution) Order 1976, § 71.[6]

[4] See generally 6 *Halsbury's Laws of England* para. 983 (4th ed. 1991) ("Her Majesty's government in the United Kingdom is internationally responsible for the external affairs of United Kingdom dependent territories," and can, *inter alia*, "create international obligations and liabilities * * * in respect of the dependent territories," and bind them by its "declaration of war or peace"); *id.* para. 988 ("[t]he competence of the Parliament of the United Kingdom to legislate for the overseas dependencies of the Crown has not been in serious doubt since the seventeenth century").

[5] The United States' international agreement with the British Virgin Islands is identified in the State Department's authoritative *Treaties In Force* under the heading of the "United Kingdom." See United States Dep't of State, *Treaties In Force* 302, 312 (2000) (*http://www.state.gov/s/l/c3431.htm*). The United Kingdom and the United States have also agreed to a Consular Convention, 3 U.S.T. 3426, T.I.A.S. No. 2494 (1952), which is "[a]pplicable to all territories over which the United States has jurisdiction * * * and *to all British Territories*." *Treaties In Force*, *supra*, at 304 (emphasis added). The Convention defines those "nationals" of each country who may avail themselves of the consular arrangements under that agreement. "[I]n relation to His Majesty," the Convention defines "nationals" to include "all citizens of the United Kingdom and colonies * * *, including, where the context permits, all juridical entities duly created under the law of any of those territories." Consular Convention, Art. 2, sec. (4), 3 U.S.T. at 3428.

The British Virgin Islands Constitution was issued by Queen Elizabeth as an Order in Council, acting pursuant to her sovereign prerogative and statutory authority from Parliament under the West Indies Act. 6 *Halsbury's Laws of England*, *supra*, para. 1079, citing, *inter alia*, West Indies Act 1962, § 5. Full executive authority over the British Virgin Islands is vested in the Queen, Constitution § 13, who appoints a Governor to serve at her pleasure and to exercise powers in her behalf, *id.* §§ 3-6. The legislature, which consists of the Queen and a popularly elected Legislative Council, has authority to "make laws for the peace, order and good government of the Virgin Islands," and a bill becomes law only when assented to by the Queen or by the Governor "on her Majesty's behalf." *Id.* §§ 25, 34, 42. The Queen may also disallow a law to which the Governor has already assented. *Id.* § 43.

Corporations organized within the British Virgin Islands, like the citizens thereof, are therefore subject, ultimately, to the United Kingdom's sovereignty. Hence, the plain language of the alienage diversity statute, coupled with unambiguous provisions of British law, is sufficient by itself to establish that a federal district court may entertain this suit between a New York corporation and a corporation organized under the laws of the British Virgin Islands.

B. The Origins And History Of Alienage Diversity Jurisdiction Confirm The Plain Meaning Of The Statute

The plain terms of the alienage diversity statute take on additional significance when read in historical context. The

[6] The British Virgin Islands Constitution is reprinted in 2 *Constitutions of Dependencies And Special Sovereignties* (Blaustein ed., 1982), and at the following web-site: *http://www.bvi.gov.vg/template.php?main=vg&section=national_focus&sub=constitution*.

concept of alienage diversity jurisdiction originated at the Constitutional Convention. The Framers made provision for that jurisdiction to avoid controversies with foreign governments and to encourage foreign commerce and investment. Congress implemented the Framers' design through legislation that, while evolving over the years, has always granted federal courts jurisdiction to hear suits between citizens of a State and corporations subject to the authority of a foreign state, such as the British Virgin Islands corporation involved in this case.

1. The Framers Authorized Federal Jurisdiction Over Controversies Between Citizens Of A State And Corporations Subject To The Sovereign Authority Of A Foreign State

The Constitution provides that the "judicial Power" of the United States shall extend to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. Art. III, § 2, Cl. 1. The Framers included that Clause expressly to enable Congress to provide a neutral federal forum for lawsuits involving foreign citizens and subjects, in addition to the judicial fora provided by the individual States. Experience under the Articles of Confederation revealed the need for a neutral national forum for foreigners in litigation with United States citizens. See generally Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations And Modern Justifications For Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int'l L. 1, 6-10 (1996).[7]

Following the Revolutionary War, various state courts and legislatures, responding to anti-British sentiment, made

[7] See also 15 James Wm. Moore, et al., *Moore's Federal Practice* § 102.73 (3d ed. 1999); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1927-1928).

it difficult for British creditors to collect private debts from American debtors, notwithstanding the United States' agreement in the Treaty of Paris that no impediments would be imposed to the collection of "the full value * * * of all bona fide debts heretofore contracted." Definitive Treaty of Peace, Sept. 3, 1783, United States-Great Britain, Art. 4, 8 Stat. 82. See Johnson, *supra*, 21 Yale J. Int'l L. at 6-10. The States' conduct threatened to antagonize a major foreign power and to discourage much-needed foreign investment. See *ibid.* Consequently, the various plans the Framers considered for the Constitution all proposed to address that problem by providing a national forum for suits between citizens of a State and "foreigners." *Id.* at 10.[8]

The Framers enunciated two specific reasons why the Constitution should provide for alienage jurisdiction: to avoid controversies with foreign governments and to encourage foreign commerce and investment. Alexander Hamilton provided the classic statement of the former reason:

> [T]he peace of the WHOLE ought not to be left at the disposal of a PART. The union will undoubtedly be

[8] See 1 *The Records of the Federal Convention of 1787* at 22 (Max Farrand ed., 1911) (Farrand) (Randolph's Virginia Plan) ("jurisdiction * * * to hear & determine * * * cases in which foreigners * * * may be interested"); *id.* at 244 (Patterson's New Jersey Plan) ("authority to hear & determine * * * in all cases in which foreigners may be interested"); *id.* at 292 (Hamilton's Plan) ("jurisdiction * * * in all causes in which * * * the citizens of foreign nations are concerned"); 2 Farrand 432 (Mason's Plan) ("jurisdiction * * * shall extend to * * * controversies * * * between a State and the citizens thereof and foreign States, citizens or subjects") (emphasis omitted); 3 Farrand 608 (Pickney's Plan) ("Questions * * * on the Construction of Treaties made by U.S—or on the Law of Nations.") (emphasis omitted); see also *id.* at 169-170 (diary of Ezra Stiles) (Framers "were unanimous [convinced] in the Expedy & Necessy of a supreme judiciary Tribunal of universal Jurisdiction—in Controversies of a legal Nature between States—Revenue—& appellate Causes between subjects of foreign or different States.").

> answerable to foreign powers for the conduct of its members [*i.e.*, the States]. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.

The Federalist No. 80, at 403-404 (Alexander Hamilton) (Wills ed. 1982).[9] James Wilson articulated the latter reason:

> [I]s it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? * * * It was thought proper to give the citizens of foreign states full opportunity of obtaining justice in the general courts, and this they have by its appellate jurisdiction; therefore, in order to restore credit with

[9] See also Joseph Story, *Commentaries on the Constitution* § 888, at 633-634 (Ronald D. Rotunda & John E. Nowak eds., 1987) (quoting Hamilton). Hamilton pointed out that an injustice against a "foreigner," if unredressed, could be regarded as "an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general laws of nations." *The Federalist No. 80*, at 404. Indeed, "[s]o great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals." *Ibid.* Others expressed similar views. See, *e.g.*, 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 583 (Jonathan Elliot ed., 1987) (Elliot) (comments of James Madison); 2 Elliot 491-493 (James Wilson); 4 Elliot 158-159 (William Davie); Letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787), *reprinted in* 14 *The Documentary History of the Ratification of the Constitution* 193, 204 (1983).

> those foreign states, that part of the article is necessary. I believe the alteration that will take place in their minds when they learn the operation of this clause, will be a great and important advantage to our country; nor is it any thing but justice: they ought to have the same security against the state laws that may be made, that the citizens have; because regulations ought to be equally just in the one case as in the other.

2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 491-492 (Jonathan Elliot ed., 1987).[10]

The district court's exercise of jurisdiction in this case falls comfortably within both the text and original purpose of the Constitution's alienage diversity clause. Then, as now, the term "subject" included all persons who were subject to the sovereign authority of a foreign state.[11] Indeed, this Court has articulated that proposition specifically with re-

[10] See 3 Elliot 583 (James Madison) ("We well know, sir, that foreigners cannot get justice done them in [the state] courts, and this has prevented many wealthy gentlemen from trading or residing among us."). See also Story, *supra*, § 889, at 634-635.

[11] See Samuel Johnson, *A Dictionary Of The English Language* (1755; facsimile ed. Georg Olms Verlagsbuchhandlung 1968) (defining "subject" as "[o]ne who lives under the dominion of another"); Noah Webster, *American Dictionary of the English Language* (1828; facsimile ed. Foundation for Christian Education 1985) ("subject" is "[o]ne that owes allegiance to a sovereign and is governed by his laws"). See also 2 James Kent, *Commentaries on American Law* 258 n.b (6th ed. 1848) ("subjects" are "bound by allegiance and subjection to the government and law of the land"); *Inglis* v. *Trustees of the Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J., dissenting) ("The rule commonly laid down in the books is, that every person who is born within the ligeance of a sovereign is a subject * * *. Now, allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth, is that which arises from being born within the dominions and under the protection of a particular sovereign.").

spect to what persons were subjects of Great Britain at the time the Constitution was adopted. See *Wong Kim Ark*, 169 U.S. at 658-666.[12] Moreover, as this Court concluded more than a century ago, foreign corporations come within this definition because they are necessarily created under the laws, and subject to the authority, of some foreign state. See *Steamship Co.*, 106 U.S. at 121.[13] A federal court's exercise of jurisdiction over cases like this one is also consistent with the original purposes of the alienage diversity clause because, as explained below (at pp. 23-25 *infra*), the Second Circuit's *Matimak* decision has caused substantial tension with the United Kingdom and could discourage significant amounts of international trade. An historical reading of the underlying constitutional provision thus confirms the plain meaning of the alienage diversity statute.

2. The Alienage Diversity Statute, Throughout Its History, Has Conferred Jurisdiction Over Suits Between Citizens Of A State And Corporations Subject To The Sovereign Authority Of A Foreign State

Congress has effectuated Article III's establishment of alienage diversity jurisdiction through a series of enactments, including: (a) the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78; (b) the Act of March 3, 1875, ch. 137, 18 Stat. (Pt. 3)

[12] For example, the Court cited approvingly, the following passage from *State* v. *Manuel*, 4 Dev. & Bat. 20, 24 (N.C. 1838): "Before our Revolution, all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native-born British subjects; those born out of his allegiance were aliens." *Wong Kim Ark*, 169 U.S. at 663.

[13] See also Story, *supra*, § 891, at 635-636 ("The inquiry may here be made, who are to be deemed aliens entitled to sue in the courts of the United States. The general answer is, any person, who is not a citizen of the United States. * * * A foreign corporation, established in a foreign country, all of whose members are aliens, is entitled to sue in the same manner, that an alien may personally sue in the courts of the Union.").

470; and (c) the 1948 recodification of the Judicial Code, ch. 646, § 1332(a)(2), 62 Stat. 930, as amended by the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891. In each instance, Congress has granted federal courts alienage diversity jurisdiction through language synonymous with Article III's alienage diversity clause. That language, which implements the Framers' objectives of avoiding disputes with foreign governments and facilitating international commerce, is sufficiently broad to embrace suits involving foreign corporations such as the British Virgin Islands corporation involved here.

a. The Judiciary Act of 1789, under which the federal courts were first organized, provided that the federal courts "shall have original cognizance * * * of all suits of a civil nature * * * where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and * * * an alien is a party." § 11, 1 Stat. 78. There is no evidence that the First Congress used the term "alien" to connote a measure of jurisdiction other than that authorized by the Article III's alienage diversity clause. That Congress, like the Framers and this Court during that period, used the term "alien" synonymously with the terms "foreigner" and "Citizens or Subjects" of a foreign state.[14] The legislative history of the Judiciary Act indicates that the First Congress, like the Framers, intended to refer to *any* person who is subject to the authority of a foreign state.[15]

[14] See *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87-88 (1809) (Marshall, C.J.) (recognizing that Article III "established national tribunals for the decision of controversies between aliens and a citizen"), overruled in part on other grounds, *Louisville, Cincinnati & Charleston R.R.* v. *Letson*, 43 U.S. (2 How.) 497 (1844); see also *Mossman* v. *Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800).

[15] Oliver Ellsworth, the principal architect of the Judiciary Act, described the jurisdictional proposal as encompassing "controversies between foreigners and citizens" in a letter discussing the "outlines of a

The Congress that enacted the Judiciary Act of 1789 included many of those who had taken part in framing the Constitution, and it was no less aware than the Framers of the foreign relations and commercial concerns that had motivated the creation of alienage diversity jurisdiction. That Congress drafted the Judiciary Act to implement the solution that the Framers had envisioned—a federal forum for suits between citizens of a State and those who are "citizens" or "subjects" of a foreign state. Cf. *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983); *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

b. The Act of March 3, 1875, replaced the Judiciary Act's language granting jurisdiction over suits in which "an alien is a party" with language stating that federal courts shall have jurisdiction over suits "between citizens of a State and foreign states, citizens, or subjects." 18 Stat. (Pt. 3) 470. The legislative history of the 1875 Act does not indicate a reason for the change. See 2 Cong. Rec. 4978-4988 (1874); 3 Cong. Rec. 1992, 2168, 2240, 2275 (1875). It was most likely made, however, to eliminate any basis for claiming that federal court jurisdiction could be invoked simply by alleging that one of the parties was an alien without regard to the citizenship of the opposing party. See Johnson, *supra*, 21 Yale J. Int'l L. at 21; see also *Jackson* v. *Twentyman*, 27 U.S. (2 Pet.) 136 (1829) (noting that the Judiciary Act "must be construed in connexion with and in conformity to the con-

judiciary system" then before his Senate Committee. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 60 (1923). That language was repeated in the draft bill. *Id.* at 77-79. The term "foreigner" was changed to "alien" sometime before final enactment, possibly by the Senate. Cf. *id.* at 90-91 (similar change to the provision governing removal of suits by "aliens" from state court). The legislative debates generally referred to "foreigners" or "aliens." See 1 Annals of Congress 810, 814, 825 (Joseph Gales ed., 1834) (House debates); see also Friendly, *supra*, 41 Harv. L. Rev. at 501-502.

stitution" and therefore did not extend jurisdiction "to private suits, in which an alien is a party, unless a citizen be the adverse party"); accord *Hodgson* v. *Bowerbank*, 9 U.S. (5 Cranch) 303 (1809); *Mossman* v. *Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800). The effect of that amendment was to place in force an alienage diversity statute that tracked, even more closely, the language of Article III's alienage diversity clause. The similarity in language indicates that Congress fully intended that the statute would be applied consistently with the objectives of the clause—to avoid controversies with foreign governments and to facilitate commerce. Had Congress intended to contract the scope of alienage diversity jurisdiction, it presumably would have said so.

c. Congress recodified the Judicial Code in 1948, granting district courts jurisdiction over suits between, *inter alia*, "Citizens of a State, and foreign states or citizens or subjects thereof." 62 Stat. 930, codified at 28 U.S.C. 1332(a)(2)). That formulation did not differ in substance from the 1875 Act. Congress further amended that provision, through the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891. That amendment removed Section 1332(a)(2)'s reference to suits in which "foreign states" themselves are a party.[16] As a consequence, the alienage diversity statute now grants federal district courts jurisdiction over suits between "citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. 1332(a)(2). That formulation, like the Judiciary Act of 1789 and the Act of March 3, 1875, imparts the full measure of Article III's alienage diversity jurisdiction.

[16] Suits between citizens of a State and a foreign state are now separately authorized in 28 U.S.C. 1332(a)(4) (foreign state as plaintiff) and 28 U.S.C. 1602 *et seq.* (limited conditions under which foreign sovereign may be sued as defendant).

The foregoing history demonstrates that, while the precise language of the alienage diversity statute has evolved over the past two centuries, its meaning and objectives have remained constant. The alienage diversity statute has consistently granted federal courts jurisdiction over suits between a citizen of a State and a corporation, like respondent, that is subject to the authority of a foreign state. That grant fulfills the Framers' express objective of providing a neutral national forum for such disputes, in order to avoid controversies with foreign governments and to encourage international commerce.

C. The Court Of Appeals' Rationale For Refusing To Recognize Alienage Diversity Jurisdiction Over Corporations Of United Kingdom Overseas Territories Is Flawed

The Second Circuit, alone among the courts of appeals that have considered the issue, has refused to treat citizens and corporations of United Kingdom Overseas Territories as "citizens or subjects" of the United Kingdom for purposes of the alienage diversity statute.[17] That court has not contested the United Kingdom's ultimate sovereignty over its Overseas Territories or the United States' recognition of that sovereignty. Rather, the court scrutinized British laws governing citizenship and nationality, which were enacted to effectuate that country's domestic residency and immigration policies, and attempted to determine whether corporations chartered in United Kingdom Overseas Territories are "citizens or subjects" within the meaning of the laws of the

[17] Compare Pet. App. 1a-7a with *Southern Cross Overseas Agencies, Inc.* v. *Wah Kwong Shipping Group Ltd.*, 181 F.3d 410 412-413 (3d Cir. 1999) (pre-reversion Hong Kong corporation); *Koehler* v. *Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998) (Bermuda resident); *Wilson* v. *Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-1243 (7th Cir. 1990), cert. denied, 499 U.S. 947 (1991) (Cayman Island corporation).

United Kingdom. The court of appeals' construction of foreign law led it to the anomalous conclusion that such corporations, which owe their existence to United Kingdom law, are nevertheless "stateless." *Matimak*, 118 F.3d at 82-86; see also *Koehler* v. *Bank of Bermuda (New York) Ltd.*, 209 F.3d 130, amended, 229 F.3d 424, rehearing en banc denied, 229 F.3d 187 (2d Cir. 2000); *Universal Reinsurance Co.* v. *St. Paul Fire & Marine Ins. Co.*, 224 F.3d 139 (2d Cir. 2000).

The court of appeals overlooked that the question whether corporations chartered in United Kingdom Overseas Territories are "citizens or subjects" of the United Kingdom for purposes of Article III and the alienage diversity statute is a question of federal law, rather than United Kingdom law. The United Kingdom strongly disputes the court of appeals' construction of its laws. See, *e.g.*, British Embassy, Washington, D.C., Diplomatic Note No. 13/2000 (Feb. 2, 2000).[18] But even assuming, arguendo, that the court of appeals correctly interpreted those laws, the meaning that a foreign country may give, under certain of its own laws and for its own purposes, to the terms "citizen" or "subject" does not control whether an individual or entity falls within the meaning of those terms for the purposes that the Framers and Congress intended. As Judge Sotomayer observed:

> None would argue with the notion that a foreign state is entitled to define what persons or entities fall into its categories of "citizen" or "subject," or any other of a variety of legal forms that exist under its own domestic immigration, nationality, and commercial law. The domestic meaning that any particular country may give to the terms "citizen" or "subject" does not, however, bind our courts in determining whether an individual or entity

[18] The United Kingdom has informed us that it intends to file a brief amicus curiae, setting forth its views on the question presented in this case.

> falls within the statutory meaning of such terms as provided by our law of alienage jurisdiction. The wide disparity in meaning that exists among countries concerning such terms requires that our alienage jurisdiction be determined not according to the appearance of the words "citizen" or "subject" (or translation thereof) in the pages of a country's domestic code, but according to whether United States law deems such persons or entities to be "citizens or subjects" under our Constitution and statutes for the purpose of alienage jurisdiction.

Koehler, 229 F.3d at 190 (Sotomayer, J., dissenting).[19] Cf. 15 James Wm. Moore, et al., *Moore's Federal Practice* § 102.34[3][a] (3d ed. 2001) ("Determination of a litigant's state of domicile for purposes of diversity is controlled by federal common law, not by the law of any state.").

As previously explained (pp. 8-9, *supra*), the term "citizens or subjects of a foreign state" has a specific meaning for purposes of alienage diversity jurisdiction. By virtue of its plain terms, the phrase includes any individual or corporation that is subject to the sovereign authority of a foreign state. The determination whether an individual or corporation qualifies, in most cases, is simple. The courts need simply to determine whether the United States recognizes the sovereignty of the foreign state to which the individual owes allegiance or to which the corporation ultimately owes its existence. In cases in which the status of the person or individual is in doubt, the court should give deference to the views of the United States respecting the status of the person or entity. See *Southern Cross Overseas Agencies, Inc.* v. *Wah Kwong Shipping Group, Ltd.*, 181 F.3d 410, 418 (3d Cir. 1999) (giving deference to the Executive Branch's judgment).

[19] Judge Sotomayer's reasoning is confirmed by *Steamship Co.* v. *Tugman*, 106 U.S. 118 (1882). That case involved a corporation that, in support of a petition to remove a suit from state court to federal court, alleged that it had been "created by, and exist[ed] under, the laws of the United Kingdom of Great Britain and Ireland." *Id.* at 121. This Court did not scrutinize United Kingdom law to determine whether that country regarded such corporations as its "citizens or subjects." Instead, the Court held that—"for purposes of jurisdiction in the courts of the United States"—"a corporation of a foreign State is * * * to be deemed, constructively, a citizen or subject of such State." *Ibid.*

The court of appeals' contrary approach not only subverts the plain meaning of the alienage diversity statute, but also undermines its basic purpose of avoiding controversy with foreign governments. As Judge Sotomayor observed, "there can be no doubt that the fundamental purpose of alienage jurisdiction—to [a]void offense to foreign nations—is frustrated by the *Matimak* decision." 229 F.3d at 188. The United Kingdom, "the very country the drafters of the alienage jurisdiction provision had in mind more than two hundred years ago when they sought to open the federal courts to foreign litigants," *id.* at 189, has repeatedly expressed its strong disapproval of that decision to the United States government and to the United States courts, *id.* at 188 n.3.

The court of appeals' erroneous ruling also threatens to undercut substantially another purpose of alienage diversity jurisdiction—to encourage international trade with the United States by assuring foreign businesses access to a neutral federal forum for the resolution of disputes with American concerns. In addition to the United Kingdom, a number of other nations have dependent territories or possessions.[20] Some of those territories and possessions

[20] Those nations include France (Bassas da India, Clipperton Island, Europa Island, French Polynesia, French Southern and Antarctic Islands, Glorioso Islands, Juan de Nova Island, New Caledonia, Tromelin Island, and Wallis and Futuna), the Netherlands (Aruba and the Netherlands Antilles), Australia (Ashmore and Cartier Islands, Christmas Island, Cocos (Keeling) Islands, Coral Sea Islands, Heard Island and McDonald

—including Anguilla, Aruba, Bermuda, the British Virgin Islands, the Cayman Islands, the Netherlands Antilles, and the Turks and Caicos Islands—are important commercial centers for global banking, insurance and other businesses that regularly transact substantial volumes of business with citizens of the United States. See Secretary of State for Foreign and Commonwealth Affairs et al., *Review of Financial Regulation in the Caribbean Overseas Territories and Bermuda* (Oct. 2000) (*Review of Financial Regulation*) <*http://www.archive.official-documents.co.uk/document/cm48/4855/4855.htm*>.

For example, the British Virgin Islands are home to more than 1500 mutual funds, as well as several hundred thousand other corporations. See *Review of Financial Regulation—The British Virgin Islands*, *supra*, at 1.2. The United States conducts extensive trade with the British Virgin Islands, which in the year 2000 totaled $64.6 million in exports and $30.9 million in imports, for a positive trade balance of $33.7 million. United States Census Bureau, *Statistical Abstract of the United States* 802 (2001).

Bermuda is a major international center for insurance. Bermuda insurance companies collect gross annual premiums of more than $20 billion annually and maintain total assets of more than $100 billion. See *Review of Financial Regulation—Bermuda*, *supra*, at 1.2. In the year 2000, the United States had $428.1 million in exports to Bermuda, and $39 million in imports, for a positive trade balance of $389.1 million. *Statistical Abstract of the United States*, *supra*, at 802.

Islands, Norfolk Island), New Zealand (Cook Islands, Niue, and Tokelau), Denmark (Faroe Islands, Greenland), and Norway (Bouvet Island, Jan Mayen, Svalbard). See *http://www.state.gov/www/regions/dependencies.html*; see also *CIA World Factbook 2001*, *http://www.cia.gov/cia/publications/factbook/*.

The Cayman Islands are home to banks, insurance companies, and mutual funds. More than 450 banks from 65 countries hold assets that total in excess of $650 billion in Cayman Islands branches. See *Review of Financial Regulation—Cayman Islands*, *supra*, at 1.2. In the year 2000, the United States had $354 million in exports to the Cayman Islands, and $6.5 in imports, for a positive trade balance of $347.5 million. *Statistical Abstract of the United States*, *supra*, at 802.

These figures and statistics demonstrate that the British Overseas Territories support a substantial volume of international trade with the United States. There is no sound reason why the alienage diversity statute should not be available to provide federal jurisdiction for the important disputes that inevitably arise in the course of extensive commercial dealings. To the contrary, it is critical that the federal forum that Congress intended be available for the benefit of commercial interests in both the United States and the United Kingdom.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISION INVOLVED

1. Section 1332 of Title 28 of the United States Code provides:

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district

court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.